

The ADA and Models of Equality

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The drafters of the Americans with Disabilities Act are facing the difficulty of reconciling the Act's language—which envisions the achievement of equal opportunity and emphasizes the need for affirmative steps to eliminate barriers to inclusion and participation for persons with disabilities—with the limits of the formal equality model applied in the United States Supreme Court's interpretation of the Fourteenth Amendment. This article discusses the shortcomings of the Supreme Court's traditional equal protection doctrine, and its requirement for discriminatory intent or improper motive, when applied in the context of persons with disabilities. After briefly examining the contrasting material equality model that has come to prevail in international disability antidiscrimination law, the article focuses on Canadian constitutional equality provisions and jurisprudence. The Supreme Court of Canada explicitly rejected the limits of the American formal equality model when first interpreting the Canadian Charter of Rights and Freedoms, and the difference in result for persons with disabilities is evident in the Court's recent 1997 decision, Eldridge v. British Columbia (Attorney General). While the Canadian approach bears its own anomalies of reasoning, it clearly recognizes something that the American approach has so far failed to admit: that the "same" treatment can perpetuate exclusion, discrimination, and inequality for persons with disabilities.

I. INTRODUCTION

The Americans with Disabilities Act (ADA) has been a hallmark around the world encouraging the development of disability civil rights in international forums and in countries everywhere. The ADA is being studied and used as a model internationally. Many foreign activists have come here to talk to many of us, and American disability activists have been invited to speak to activists and governmental policymakers around the world.

Any history or analysis of the ADA always begins with its underpinnings in the American civil rights tradition. This tradition is seen as a major advantage in achieving the passage and enforcement of the ADA. There can be no doubt that this

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civil rights tradition was used as a strong moral imperative in advocating for a comprehensive civil rights statute for people with disabilities. Throughout the committee reports and floor statements, the statement was continually made that the ADA simply would complete the path taken in the 1964 Civil Rights Act,¹ which prohibited discrimination on the basis of race, color, and national origin,² and later, gender.³ People with disabilities are referred to as the largest minority group, as they are still lacking basic civil rights protections. The findings of the ADA emphasize the civil rights nature of the ADA, even adopting verbatim the Supreme Court's description of racial minorities.

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁴

There can be no doubt that the previous civil rights achievements and precepts were fundamental and necessary ingredients to successful passage of the ADA. This tradition also accounts for the enforcement infrastructure on which ADA enforcement depends.⁵ However, ten years later we are also starting to encounter the limits of that tradition in achieving the true goals of the ADA, inclusion and participation.

As drafters of the ADA, we⁶ never discussed theories of equality. Using the rhetoric of traditional civil rights, which focuses on equal treatment, we incorporated nondiscrimination provisions from section 504 implementing regulations that assured that different treatment would be provided when necessary to achieve equal

¹ 42 U.S.C. § 12101(a)(4) (1994); 136 CONG. REC. H2639 (daily ed. May 22, 1990) (statement of Rep. Dellums); 135 CONG. REC. S4979-2 (daily ed. May 9, 1989) (statements of Sen. Harkin and Sen. Riegle); 136 CONG. REC. H2425-27 (daily ed. May 17, 1990) (statement of Rep. Hoyer).

² 42 U.S.C. § 2000d (1994).

³ *E.g.*, Education Amendments of 1974, 20 U.S.C. § 1681(a) (1994).

⁴ Americans with Disabilities Act, 42 U.S.C. § 12101(7) (1994); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that "discrete and insular minorities" may not be properly protected by the political process).

⁵ *See* 42 U.S.C. § 12117 (1994) (incorporating Title VII remedies, 42 U.S.C. § 2000(e)(4)-(9) (1994), for employment discrimination); 42 U.S.C. § 12133 (1994) (incorporating remedies of section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994)); 29 U.S.C. § 794(a) (1994) (incorporating remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(4)-(9) (1994)).

⁶ The first person references regarding the drafting of the ADA refer to Arlene Mayerson and the other ADA drafters and do not include Silvia Yee, the co-author of this article.

opportunity.⁷ We were insistent that reasonable accommodation *was not* affirmative action but simply part and parcel of meaningful nondiscrimination. Unlike the women's movement, which has been hotly debating the wisdom of ever veering from the equal treatment paradigm,⁸ the disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the goals of inclusion and participation.

In other words, we conceptualized equal protection as equal opportunity, which by necessity required affirmative steps to eliminate barriers to participation. We had every reason to be confident. Unfortunately, recent Supreme Court decisions are forcing us to confront head-on the limitations of traditional equal protection doctrine. Recent cases have held that suits against states can be brought only if the legislation is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.⁹ Cases challenging the constitutionality of the ADA as applied to states have forced ADA lawyers to make the hybrid ADA model fit traditional doctrine. As one of the authors of the brief on behalf of respondents in the cases currently before the Supreme Court,¹⁰ I have found the process tortured and tormenting.

My original idea was to share this process with the international community as they struggle to formulate nondiscrimination principles. The prospect of starting from scratch, or at least not being bound by the peculiarities of American Fourteenth Amendment jurisprudence became more and more appealing. What I found in starting to do some international research is that there is a very rich dialogue in the international arena about approaches to equality. While the United States is hailed as a forerunner in disability rights because of the ADA, the narrow equality underpinnings of the Constitution threaten a major setback.

In this article, we will first set forth two models of nondiscrimination, formal and

⁷ 29 U.S.C. § 794 (1994); 28 C.F.R. § 42 (1978).

⁸ See generally, e.g., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1987); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303 (1995); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Wendy Webster Williams, *The Equality Crisis: Some Reflection on Culture, Courts, and Feminism*, 7 WOM. RTS. L. REP. 175 (1982). Christine A. Littleton provides a relatively recent overview of "women and the law" texts and casebooks in *Whose Law Is This Anyway?*, 95 MICH. L. REV. 1560 (1997).

⁹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁰ *Univ. of Ala. Bd. of Trs. v. Garrett*, No. 99-1240 (U.S. argued Oct. 11, 2000), *cert. granted*, 68 U.S.L.W. 3654 (U.S. Apr. 17, 2000). As this article was about to go to press, the *Garrett* case was decided. One may find this decision at No. 99-1240, 2001 U.S. LEXIS 1700 (U.S. Feb. 21, 2000).

material nondiscrimination. We will then discuss Fourteenth Amendment jurisprudence as an example of formal nondiscrimination, and some international developments as examples of material nondiscrimination, eventually focusing on Canadian jurisprudence which directly confronts and contradicts the American model.

Under formal equality, the law treats similarly situated persons the same. The underpinnings of this paradigm is that goods should be distributed according to merit and all individuals are able to compete equally if treated equally. Under material equality, sometimes called substantial or genuine equality, the focus is not on being treated equally but on being treated as an equal.¹¹ The concept of material equality acknowledges the importance of individual and group differences and takes into account both personal and environmental barriers that inhibit societal participation. Therefore, barriers that deny or limit an individual's right to be an equal member of society should be eliminated.

II. THE U.S. MODEL OF EQUALITY

A good starting point for understanding how disability fits into traditional equal protection doctrine is the Supreme Court's discussion in *Cleburne v. Cleburne Living Center, Inc.*¹² *Cleburne* involved a challenge to a zoning ordinance that excluded group homes for individuals with developmental disabilities. The Supreme Court, for the first time, discussed the proper level of review to be accorded people with mental retardation under the Constitution. Key to the Court's decision that classifications based on disability should *not* get heightened scrutiny under the Fourteenth Amendment was the Court's belief that people with disabilities are not similarly situated to people without disabilities and may require "special treatment." The Court stated: "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."¹³ In the Court's mind, being different or needing something different distinguishes people with disabilities from racial minorities and women. The fact that disability may sometimes be a valid basis for legislative distinctions justifies the Court's refusal to carefully examine the use of disability as a legislative proxy. So long as a state acts rationally, the Court will not second-guess state decisions about people with disabilities. Rationality requires minimal justification.¹⁴

Since the neighbors in *Cleburne* were not acting rationally, but rather based on

¹¹ See *infra* notes 33, 40 and accompanying text.

¹² 473 U.S. 432 (1985).

¹³ *Id.* at 439 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

¹⁴ Race-based distinctions require the state to have a compelling state interest, which as a practical matter is virtually impossible. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

irrational prejudice, the Court ruled in favor of the group home—the result: equal treatment to others who were not subject to the zoning ordinance restrictions.¹⁵ For purposes of zoning, the Court saw the residents who were mentally retarded and their neighbors as similarly situated.¹⁶

So what happens in the analysis when the reasonable accommodation and barrier-removal provisions of the ADA are involved? How does the Court's decision to grant only rational-basis review to disability-based classifications affect the validity of these provisions? These are the issues we have been struggling with in preparing to defend the ADA's constitutionality before the United States Supreme Court.

Recent Supreme Court cases have established a test for Fourteenth Amendment legislation, which shows that Congress's principle concern was remedying constitutional violations as defined by the Court. The Court recognizes that Congress is not limited under Section 5¹⁷ to simply codifying Supreme Court rulings, but may enact legislation "both to remedy and to deter violation[s] of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."¹⁸ The appropriate size of the swath is defined through "congruence and proportionality."¹⁹ I call it the jelly donut rule. The bigger the jelly center (constitutional violations), the bigger the donut (swath) can be.

Our task has now become the daunting one of fitting the ADA into this framework. There are two steps: (1) defining what is unconstitutional conduct, and (2) determining what is a proportionate response to remedy or deter such conduct. In the first step, we are confronted with the role of intent or improper motive as developed in the race and gender cases, most notably *Washington v. Davis*²⁰ and *Massachusetts v. Feeney*.²¹ In these cases, the Court held that legislation that is neutral on its face will not be violative of the Fourteenth Amendment without a

¹⁵ See *Cleburne*, 473 U.S. at 448. Among the users allowed by the zoning ordinance were fraternity and sorority houses and nursing homes. *Id.* at 436 n.3.

¹⁶ 473 U.S. at 448.

¹⁷ The Fourteenth Amendment provides in pertinent part:

Section 1: No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

....

Section 5: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 2, 5.

¹⁸ *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 644 (2000) (to be published at 528 U.S. 62 (2000)) (footnote omitted) (citing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)).

¹⁹ *Id.* at 645.

²⁰ 426 U.S. 229 (1976).

²¹ 442 U.S. 256 (1979).

showing of discriminatory purpose. The Court held that the state must be found to have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse affects upon an identifiable group."²² In other words, foreseeable consequences are not enough. If the racial distinction is explicit, heightened scrutiny assumes an intent to discriminate because race is assumed irrelevant to any legitimate classification.

So, I and the other brief writers on the ADA constitutional cases are reevaluating the ADA and its history from this perspective. We assume that some actions by states indisputably fall into the unconstitutional core (the jelly center). Such actions that fall into this core are all of the by-products of the eugenics era—institutionalization, forced sterilization, and prohibitions on the right to marry.²³ Other actions, like the denial of the right to vote based on broad disqualifiers or denials by state employers based on demonstrated bias, may fit the core.²⁴ Rejections from employment opportunities based on discomfort and negative attitudes should be considered unconstitutional.

What about Congress's concerns about lack of accessible transportation, access to buildings, and reasonable accommodation? This is where I have found the arguments excruciating. For twenty years, I have been involved in a concerted effort to explain the nature of discrimination against people with disabilities as involving not just intent or malice, but also benign neglect, thoughtlessness, and oversight. I co-counseled in *Alexander v. Choate*²⁵ and hailed the part of the decision that recognized that discrimination against people with disabilities includes barriers to participation, whether erected by design or neglect. The court accepted that:

much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. . . . [S]tatements [by Congress regarding overcoming barriers to participation] would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.²⁶

This portion of *Alexander* is a liability. The constitutional framework for

²² *Id.* at 279.

²³ For a review of this history, see generally Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991).

²⁴ A federal report issued in 1989 showed that eighty-two percent of the state officials polled found that negative attitudes and misconceptions about the abilities of people with disabilities had either a strong or moderate impact on state employment of persons with disabilities. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS (ACIR), DISABILITY RIGHTS MANDATES, FEDERAL AND STATE COMPLIANCE WITH EMPLOYMENT PROTECTIONS & ARCHITECTURAL BARRIER REMOVAL 72 (Apr. 1989).

²⁵ 469 U.S. 287 (1985).

²⁶ *Id.* at 296–97.

Fourteenth Amendment equal protection, as defined by the recent cases, forces us to argue that the ADA was primarily concerned with intentional, discriminatory conduct or with deterring or remedying such conduct.

Disability policy makers and activists are perplexed. Wasn't our whole effort in the ADA to establish a model of nondiscrimination that ensured equal opportunity not simply equal treatment? And isn't it obvious that equal opportunity requires access and accommodations? Why isn't that what we tell the Supreme Court?

So now we are confronted with the real problem. We must justify a material equality statute in formal equality terms. We must show that the ADA's requirements to remove barriers and provide accommodations were really Congress's attempt to deter future intentional discrimination or remedy past intentional discrimination. I think the remedy argument works fairly well. The state established, perpetuated, and reinforced negative and demeaning views of people with disabilities by state-sanctioned isolation and segregation. Since people with disabilities were cast as outsiders, remedial measures need to be taken to bring them back into society. Likewise, Congress can decide that increased interaction is the best remedy to negative stereotyping.²⁷

The deterrence argument, which some believe will be more important to the Court, is harder to make fit. Under this theory, the affirmative provisions of the ADA must be justified as deterring future unconstitutional, i.e., intentionally discriminatory, conduct. The classic example of this is upholding as constitutional the Voting Rights Act provisions striking down literacy tests. Because the history of animus was so great toward nonwhites in voting, the chances of the literacy test being a ruse to disguise continued animus was great. Therefore, the Court found that the ban on literacy tests was an attempt by Congress to deter outright discrimination in voting.²⁸

²⁷ As the respondents point out:

Attorney General Thornburgh, testifying in support of the ADA, declared: 'Attitudes can only be reshaped gradually. One of the keys to this reshaping is to increase contact between and among people with disabilities and their non-disabled peers.' The US Commission on Civil Rights told Congress that '[s]tudies suggest that increased positive interaction with handicapped people reduces fears and discomfort and leads to better acceptance of handicapped people'. . . . Representative Collins made the same point, noting that 'only by breaking down barriers between people can we dispel the negative attitudes and myths,' and predicting that employers would not apply false stereotypes if they saw the capabilities of persons with disabilities.' Senator Durenburger stated that the ADA will 'remove the shades many of us wear, focusing on people's abilities rather than their disabilities'. . . .

Brief for Respondents at 48, *Bd. of Trs. of the Univ. of Ala. v. Garrett* (U.S. filed Aug. 11, 2000) (No. 99-1240).

²⁸ *Katzenbach v. Morgan*, 384 U.S. 641, 653-54 (1966) (showing that the literacy test ban "was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications"); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (stating that the law was enacted in response to "an insidious and pervasive evil").

Making this argument for access or reasonable accommodation is possible, but forced. The real reason for these provisions was the recognition that equal opportunity could not be achieved without them. No one cared about the reason for the barrier—it was considered irrelevant. No one imagined that we would need to argue that Congress needed to have access requirements in order to ensure that a state was not using an architectural barrier as an excuse for purposeful exclusion that was really based on animus.

Is it really impossible to argue that equal protection in the Fourteenth Amendment means equal opportunity and that a disability equal protection statute must have access provisions in order to have any meaning *whatsoever*? Can we argue that disability discrimination should be taken on its own terms and that the equal treatment approach developed in the race and gender context just does not work? While the types of prejudice, bias, and paternalism faced by racial minorities and women are similar to that experienced by people with disabilities, the remedies are necessarily different. This is easiest to see in the area of architectural access. If equal treatment is designed to promote meritocracy, then architectural and communication access is necessary for a person who is blind, deaf, or in a wheelchair to compete on his/her merits. The consensus of brief writers in support of the ADA is that such a direct argument would meet with disfavor by the conservative majority of the Court. So we are forced to explain the obvious need for accommodation to ensure participation as a deterrent for unconstitutional conduct.

The problem with arguing that access is required to ensure that prejudice is not the real motive for exclusion (i.e., deterrence) is that access can often cost money, which means there is an equally, and maybe more, credible reason for failure to remove barriers. Under the rational basis test, this fiscal reason could very well pass muster.²⁹

This worst case scenario is unfortunately a reality in the Seventh Circuit. In *Erickson v. Board of Governors*,³⁰ the Seventh Circuit court held that Title I of the ADA is not a proper exercise of Congress's Section 5 authority because it makes "rational" employer decisions unlawful. Here is the example:

Consider this from the perspective of a university such as our defendant. A would-be professor who is not in the top 1% of the population in mental acuity is not apt to be a good teacher and scholar. Likewise it is rational for a university to favor someone with good vision over someone who requires the assistance of a reader. The sighted person can master more of the academic literature (reading is much faster than listening), improving his chance to be a productive scholar, and also is less expensive (because the university need not pay for the reader). An academic institution that prefers to use a given

²⁹ The issue of cost is problematic. If society were built to be inclusive, there would be no extra costs involved in access. Therefore, viewing access as costly creates a hierarchy where nonaccessible is "normal" and "access" abnormal.

³⁰ 207 F.3d 945 (7th Cir. 2000).

budget to hire a sighted scholar plus a graduate teaching assistant, rather than a blind scholar plus a reader, has complied with its constitutional obligation to avoid irrational action. But it has *not* complied with the ADA, which requires accommodation at any cost less than “undue hardship.”³¹

The Seventh Circuit states that because the ADA requires employers to “accommodate rather than disregard disabilities”³² it runs counter to the Fourteenth Amendment. Congress’s authority to create meaningful equal protection remedies for people with disabilities will soon be decided by the Supreme Court. If Congress is given its due, all of the provisions of the ADA are justified as remedies for historic exclusion and segregation. If the Supreme Court decides that even the remedial and deterrent authority of Congress is limited to a strict equal treatment/intent model of nondiscrimination, the ADA would be rendered meaningless. The world awaits the answer.

III. EQUALITY IN INTERNATIONAL LAW

In contrast to American jurisprudence and its deep roots in classical liberal thought, international law over the past few decades has increasingly taken its cue from the fundamental human rights assumption “that all human beings are equal in respect of their dignity, irrespective of individual or social variations. Each person is thus entitled to equal membership of society, and there is a corresponding duty on the part of the state to secure this aspiration.”³³ The resulting model of equality rejects the idea of setting social and cultural standards according to the needs of a “normal” majority, and extends the idea of equality beyond equal treatment towards equal outcome. By logical implication, such a model of equality rejects both the idea of establishing laws that achieve equality only for certain “similarly situated” persons, and an ideal that rigidly refuses to make any kind of differentiation between individuals, since the needs of *all* human beings—with their myriad differences—have to be considered.

Numerous United Nations (U.N.) and state officials have raised this last issue more explicitly in discussions about nondiscrimination provisions in the International Covenant on Civil and Political Rights (CCPR)³⁴ and the International Covenant on

³¹ *Id.* at 949.

³² *Id.* at 950.

³³ Aart Hendriks, *The Significance of Equality and Non-Discrimination*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 40, 46 (Theresia Degener & Yolan Koster-Dreese eds., 1995) [hereinafter H.R. AND D.P.] (citing J. Donald C. Galloway, *Three Models of (In)Equality*, 38 MCGILL L.J. 64, 83 (1993)).

³⁴ Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

Economic, Social, and Cultural Rights (CESCR),³⁵ the two covenants which—together with the Universal Declaration of Human Rights³⁶—form the backbone of the U.N.'s Human Rights Bill.³⁷ For instance, the U.N. Human Rights Committee has stated that:

the term "discrimination" as used in the Covenant [CCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition or enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³⁸

Clearly the notion of discrimination in international human rights law extends beyond the limits of formal equality, since discrimination encompasses not only making an unjustified distinction, but includes acts that have "the purpose or effect of nullifying or impairing the recognition or enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."³⁹ It is not the intention behind an act that is important, but its consequence for people. The U.N. Committee on Economic, Social, and Cultural Rights has gone further, and made a specific reference to disability in stating that "[f]or the purpose of the Covenant [CESCR], 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights."⁴⁰ The unambiguous reference to "reasonable accommodation" clearly moves beyond the U.S. constitutional adherence to formal equality and embraces material equality.

Ironically, this broad conception of equality comes from an international law

³⁵ Dec. 16, 1966, 993 U.N.T.S. 3.

³⁶ G.A. Res. 217A, U.N. GAOR, 3rd Sess., Supp. No. 1, U.N. Doc. A/810 (1948).

³⁷ The CCPR and the CESCR both have the status of a treaty, which means that they are considered binding and carry the obligation of domestic legal implementation for signing states; their status for nonsigning states is more uncertain—for example, the United States has not ratified the CESCR. The Universal Declaration is not a treaty, but has been extremely influential on the constitutional enactments and human rights policies of numerous states and has achieved a certain status in international law as an interpretive tool at least.

³⁸ 1 *Report of the Human Rights Committee*, General Comment No. 18(37) (nondiscrimination), U.N. GAOR, 45th Sess., Supp. No. 40, at 174, ¶ 7, U.N. Doc. A/45/40 (1990).

³⁹ *Id.* (emphasis added).

⁴⁰ *Report on the Tenth and Eleventh Sessions*, General Comment No. 5 (1994), U.N. ESCOR, 10th and 11th Sess., Supp. No. 2 [according to U.N. Doc. E/1995/22/Corr.1; E/C.12/1994/20/Corr.1], at 102, ¶ 15, U.N. Doc. #/1995/22; E/C.12/1994/20 (1995).

movement that has traditionally dealt with disabled persons as a health and welfare issue rather than a human rights issue; even now, the United Nations concept of minorities focuses on ethnic, linguistic, and religious identifiers rather than characteristics of physical or mental disability.⁴¹ The particular contribution of disability activists in the United States since the 1960s has been to insist on viewing disability as a civil rights issue, and the example of their approach to legal reform has undoubtedly helped international disability organizations "to demand civil rights rather than goodwill."⁴² The battle for disability organizations in the arena of international law, then, has not usually been over an appropriate model of equality, but gaining explicit recognition *within* the broad umbrella of human rights law. The advantage, once such recognition was achieved, was that international human rights already tended towards a material and substantive model of equality, rather than a formal model.

The question must then be asked—has this recognition been achieved? The U.N. Decade of Disabled Persons, initiated in 1982, marked a period of real change and increased visibility for international disability activism. The U.N.'s second World Conference on Human Rights, which took place June 25, 1993, explicitly links persons with disabilities to a human rights model of material equality by reconfirming:

that all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities . . . [and] calls on all Governments, where necessary, to adopt or adjust legislation to ensure access to these [life, welfare, education, work, living independently, and active participation in all aspects of society] and other rights for disabled persons.⁴³

The decade culminated in the drafting of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (StRE),⁴⁴ which were adopted by the U.N. General Assembly on December 20, 1993,⁴⁵ and intended as a basic international standard for future state programs, laws, and policies on disability. The merging of the civil rights approach of disability activists and the material equality notions of

⁴¹ Theresia Degener, *Disabled Persons and Human Rights: The Legal Framework*, in H.R. AND D.P., *supra* note 41, at 13.

⁴² *Id.* at 10.

⁴³ UNITED NATIONS, VIENNA DECLARATION AND PROGRAMME OF ACTION, *Reports of the World Conference*, at Title II, ¶ 63, UN Doc.A/CONF.157/23 (1993).

⁴⁴ G.A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (1994).

⁴⁵ The StRE are nonbinding U.N. instruments because they cannot be signed and ratified by individual nation-states. On the other hand, whatever force the Rules have is at least immediate since they came into force when adopted by the General Assembly and could eventually attain binding force in international law, if enough states apply them with the intention of establishing an "international customary rule."

international human rights is evident in the StRE's introduction, which strongly emphasizes both equality of opportunity and integration:

The term "equalization of opportunities" means the process through which the various systems of society and environment, such as services, activities, information and documentation, are made available to all, particularly to persons with disabilities. The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.⁴⁶

Even though the U.N. Comments and Declarations, the CCPR and the CESC, and the Rules are important steps towards the achievement of material equality for persons with disabilities, the lack of a binding covenant on disability antidiscrimination is still a tremendous problem in international law.⁴⁷ Ultimately, the StRE encapsulates both the strengths and the weaknesses of advancing disability rights in the arena of international law: as long as the Rules address disability as a civil rights issue, they do so within a clear context of material equality and social responsibility for reasonable accommodation, but the Rules themselves remain nonbinding and lack domestic enforcement mechanisms.

IV. CANADIAN JUDICIAL MODEL OF EQUALITY

In other countries around the world, we can see that a number of nations that have had the opportunity to draft constitutional discrimination provisions more recently than the United States have also had the chance to learn from our country's painful and convoluted struggle to define the reach and limits of our Fourteenth Amendment. The equality provisions of the Canadian Charter of Rights and Freedoms (Charter) have left the Canadian judiciary with the difficult task of

⁴⁶ *Standard Rules for the Equalization of Opportunities for Persons with Disabilities*, G.A. Res. 48/96, *supra* note 44, at 204, ¶¶ 24–26.

⁴⁷ Further, the twenty-two Rules are biased towards economic, social, and cultural rights, rather than civil and political rights. So, for instance, human rights violations, such as the forced sterilization of women with disabilities, are simply not discussed. This odd oversight likely reflects the fact that the Rules were drafted under the auspices of the U.N.'s Commission for Social Development, instead of the Commission on Human Rights or the Sub-Commission on Prevention of Discrimination and Protection of Minorities; in any event, the StRE does explicitly refer to numerous U.N. instruments in its preamble—including the CCPR—and should therefore be interpreted in light of these additional pronouncements. For a fuller exposition on the StRE and other U.N. instruments relevant to persons with disabilities, see Degener, *supra* note 41.

interpreting the applicability of formal and substantive models of equality. In this regard, Canadian jurisprudence is particularly useful for the purposes of this paper as the Supreme Court of Canada (SCC) has expressly considered and rejected the analytical route taken in the United States equal protection jurisprudence.⁴⁸

Section 15 of the Canadian Charter reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁴⁹

Section 15 first came into effect in 1985, three years after the Charter was enacted, and the first Section 15 case did not come before the SCC until 1989. In 1997, the court reiterated how, from the very beginning of its Section 15 jurisprudence, it “has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution.”⁵⁰ In its first Section 15 decision, the court had refused to restrict itself to using the “similarly situated” test, and recognized:

that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce inequality . . . [t]o approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned.⁵¹

Section 15(1)’s specific wording of equality “before and under the law” and the “equal protection and equal benefit of the law” has been referred to as the “four equalities,” and has been interpreted as a deliberate attempt to avoid the shortcomings

⁴⁸ For a useful examination of the equality models embraced by the courts of other countries, see generally *NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES* (Titia Loenen & Peter R. Rodrigues eds., 1999).

⁴⁹ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15.

⁵⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 151 Dominion Law Reports (D.L.R.) (4th) 577, 616 (Can.).

⁵¹ *Andrews v. L. Soc’y of B.C.*, [1989] 1 Supreme Court Reports (S.C.R.) 143, 164–65 (Can.).

of the prior Canadian Bill of Rights, which lacked constitutional force and only ensured "equality before the law."⁵² In cases from the 1970s, the SCC had interpreted this latter phrase in the Canadian Bill of Rights as providing only a very narrow form of formal equality, "requiring that laws be applied in an even-handed manner but leaving the content and effect of the law itself immune to judicial scrutiny."⁵³ The expansion of the equality language in Section 15 was at the very least a signal that the Charter should be interpreted as giving individuals more than a mere guarantee of strictly formal equality. In addition, Section 15(2)'s explicit reference to the "amelioration" of existing conditions of discrimination could be taken as another signal that the Charter endorsed a more substantive model of equality. Finally, Section 15's open-ended list of what constitutes a prohibited ground of discrimination would come to be taken as yet another interpretive tool for a judiciary searching for guidelines and limiting principles in a new era of discrimination protection; the court would come to see social, political, and economic *disadvantage* as the critical factor common to the enumerated grounds and other "analogous" kinds of discrimination prohibited by Section 15.⁵⁴

Another crucial tool of interpretation available to the SCC in its Section 15 interpretation is Section 1 of the Charter, which the court has expressly noted as a limiting provision unavailable to the United States Supreme Court under their Fourteenth Amendment.⁵⁵ Section 1 applies to the entire Charter and states that "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Since the SCC's 1986 foundational decision on Section 1 in *R. v. Oakes*,⁵⁶ the government has borne the onus of establishing that: (a) the objective behind the impugned legislation or action is of sufficient importance to justify a Charter

⁵² Statutes of Canada (S.C.) 1969, c. 44 (Can.) (now Revised Statutes of Canada (R.S.C.) 1985, app. III).

⁵³ Béatrice Vizkelety, *Adverse Effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality*, in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES, *supra* note 53, at 223–24.

⁵⁴ *R. v. Turpin*, [1989] 1 S.C.R. 1296 (Can.), in which the SCC held that Section 15 was not violated by a law that allowed a distinction in the mode of trial between persons in Alberta and those in the rest of Canada accused of certain offenses; since the statutory distinction did not result in actual disadvantage, the plaintiffs were not a group analogous to a Section 15 enumerated group within the meaning of the Charter. The use of the "analogous grounds" principal as a concept has been hailed by some as a means of directing equality rights towards those groups in society which are most in need of protection. See Vizkelety, *supra* note 53, at 26–27. But see, e.g., David Beatty, *The Canadian Conception of Equality*, 46 U. TORONTO L.J. 349 (1996) (criticizing the distinction as unnecessary and categorical).

⁵⁵ *Andrews v. L. Soc'y of B.C.*, [1989] 1 S.C.R. 143, 177–78.

⁵⁶ *R. v. Oakes*, [1986] 26 D.L.R. (4th) 200 (Can.).

infringement; and (b) the means chosen to achieve this objective are reasonable and justified. This second part of the test includes three parts: (i) is there a *rational connection* between the objective and the means? (ii) is there *minimal impairment* of the Charter right? and (iii) does the objective have a *proportionality of effects*? The relationship between Section 1 and Section 15 of the Charter was brought up again recently by the SCC when it referred to the government's duty to take positive action as being limited by the human rights principle of reasonable accommodation and "undue hardship." Speaking for a unanimous court, Justice La Forest wrote, "In my view, in § 15(1) cases this principle is best addressed as a component of the § 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits.' It should not be employed to restrict the ambit of § 15(1)."⁵⁷

Within this interpretive context, we can now look closely at *Eldridge v. British Columbia (Attorney General)*,⁵⁸ one of the SCC's most recent decisions on Section 15 and a pivotal case on disability rights in Canadian law. The plaintiffs in *Eldridge* first brought their case before the British Columbia (B.C.) Supreme Court because the province did not provide medical interpretation services to deaf patients. Robin Eldridge had been unable to communicate with her physician, and John and Linda Warren had undergone the ordeal of giving premature birth to their twins without being able to fully comprehend what their doctors and nurses were telling them. The plaintiffs framed their action under Section 15 of the Charter, claiming that provincial hospitals legislation discriminated against the deaf by failing to provide for sign language interpretive services when effective communication was an inherent and

⁵⁷ Having said this, there is still a trio of SCC cases from 1995 which threw serious doubt on this view of the interaction of Section 1 and Section 15. In *Miron v. Trudel*, [1995] 2 S.C.R. 418 (Can.), the concept of a "functional values" test for Section 15 was set forth in the dissenting opinion of four of the justices. The functional-values test essentially posited an additional step for Section 15 analysis: claimants under Section 15 would need to not only establish that (i) a distinction had been made, and (ii) the distinction resulted in discrimination, i.e., a burden or disadvantage, but also that (iii) the distinction had been based on a personal characteristic that was *irrelevant* to the functional values underlying the legislation. *Miron* itself dealt with a claim that the Ontario Insurance Act violated Section 15 by defining the term "spouse" in relation to married couples, thereby excluding unmarried common law spouses. The majority found that Section 15 had been violated, but the minority considered the institution of marriage as a "functional value" underlying the Act that was both relevant to legitimate legislative aims and clearly related to the grounds of the distinction. Even though the functional-values test was never relied on by a clear majority of the SCC in any case of the trilogy, which also included *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.), and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (Can.), enough references were made to the test that considerable confusion was sown among Canadian courts until the most recent Section 15 cases from 1997. For a critique of the "functional values" test and the dangers it poses, see, e.g., David Beatty, *Canadian Constitutional Law in a Nutshell*, 36 ALBERTA L. REV. 605, 618 (1998).

⁵⁸ See [1997] 151 D.L.R. (4th) 577 (Can.).

necessary component of the delivery of medical services. Both the provincial trial judge and appellate court majority⁵⁹ rejected their claim finding that the need for deaf persons to pay for interpreters arose from the fact of the disability and was not an effect of the B.C. Hospital Insurance Act⁶⁰ or the Medical and Health Care Services Act.⁶¹

The appeal to the SCC was allowed. The court began its Section 15(1) analysis⁶² by stressing the Section's "two distinct but related purposes." First, the Section "expresses a commitment—deeply ingrained in our social, political and legal culture—to the equal worth and human dignity of all persons." Second, "it instantiates a desire to rectify and prevent discrimination against particular groups 'suffering social, political and legal disadvantage in our society.'"⁶³ The decision continues by taking judicial notice of the "unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions." By beginning their Section 15(1) analysis in this way, the SCC sends a strong message that equality in the Charter is not just a tool for formally comparing faceless citizens in an abstract manner, but a legitimate ideal that has a particular and dynamic role to play in the lives of individuals and groups that suffer real disadvantage in Canadian society.

In the end, the court unanimously found that the province could not satisfy Section 15 simply by providing deaf persons with health care services strictly identical to those received by hearing persons. They accepted that effective communication is an indispensable part of medical services, and that Section 15 placed the province under an obligation to ensure that deaf persons could effectively

⁵⁹ J.A. Lambert of the British Columbia Court of Appeals found that Section 15 had been violated, but he found the violation justified under Section 1 of the Charter basing his decision on the SCC's own dictum that the *Oakes* Section 1 test should be applied flexibly and with deference when reviewing the elected government's allocation of scarce resources between different needs and groups. Since it was accepted that the province's medical plan did not have to be comprehensive (for example dental services, wheelchairs, and transportation were not covered), Lambert accepted the government's decision not to cover sign-language interpreters.

⁶⁰ Revised Statutes of British Columbia (R.S.B.C.) 1979, c. 180 (Can.).

⁶¹ Statutes of British Columbia (S.B.C.) 1992, c. 76 (Can.).

⁶² The lengthy first portion of the decision dealt with the particular issue of whether, in the facts of the case, private hospitals fell under the ambit of the Charter. The approach eventually taken by the court has important implications in an era marked by the political attractiveness of government downsizing and privatization, but this ground of the decision is obviously beyond the scope of this paper. For a more in-depth analysis of the legal reasoning on this point, see Margot Young, *Change at the Margins: Eldridge v. British Columbia (A.G.) and Vriend v. Alberta*, 10 CANADIAN J. OF WOMEN AND THE L. 244 (1998).

⁶³ *Eldridge*, [1997] D.L.R. (4th) at 612.

communicate with health care providers so as to receive equal advantage from their health care benefits under the Provincial Hospital Act. As a result, even though the two statutes in and of themselves did not violate Section 15, the province's failure to ensure the "equal benefit of the law" to persons with disabilities was a violation of the Charter. The court unmistakably endorsed a substantive model of equality when it wrote:

Section 15(1) expressly states, after all, that every individual is "equal before and under the law and has the right to the equal protection *and* equal benefit of the law without discrimination. . . ." The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.⁶⁴

Furthermore, Section 1 did not save this violation of Section 15, despite the delicate and difficult balance invoked by legislative decisions regarding the budgetary allocation of health-care dollars within the province, because the province did not establish that a *total* denial of medical interpretation services for the deaf constituted a *minimal* impairment of their rights. As La Forest stated for the court:

Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' [sic] human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship."⁶⁵

By interpreting Section 15 in a way that recognizes that certain groups may *need* a benefit in order to enjoy equality, *Eldridge* at least opens the possibility that governments are constitutionally required to take positive and substantive steps to ensure that persons with disabilities and other groups who experience discrimination receive the "equal protection and equal benefit" of the law. Also, Section 15 will provide protection even where the law itself is not making a distinction between individuals, but is merely being applied in a way that allows a distinction to exist.⁶⁶

⁶⁴ *Id.* at 623 (emphasis added).

⁶⁵ *Id.* at 631.

⁶⁶ However, despite encouraging comments in *dicta*, the Supreme Court of Canada has continued to leave the issue of positive obligations under Section 15 open, leaving the implication that the government must take account of the realities of social discrimination when they act, but need not redress the fact of that discrimination themselves. In *Friend v. Alberta*, [1998] 1 S.C.R.

While *Eldridge* does not require the government to enact nondiscrimination legislation, the decision likely has already influenced Canadian legislation, given the 1998 amendments to the Canadian Human Rights Act⁶⁷ which now requires employers to positively accommodate special needs short of undue hardship.

Eldridge has been applauded by numerous scholars and constitutional authorities. In his analysis of *Eldridge*, Bruce Porter notes that “[u]nder the emerging framework in *Eldridge*, the violation occurs, essentially, with the unmet need, not with any particular statute.”⁶⁸ On a broader, doctrinal level, Diane Pothier praises the court’s willingness to delve deeper than the kind of analysis that prevailed in the lower courts, where sign language was viewed as just another discrete service that was ancillary to medical care, such as transportation to a hospital or doctor’s office. In other words, both the trial judge and a majority of the appellate court placed emphasis on the fact that the province had the discretion to fill its basket of basic medical care with various services, and as long as this basket was equally available to able-bodied persons and persons with disabilities, there was no discrimination. The problem is that such an analysis fails to address the entrenched and unspoken assumption that there is only one “proper” way to receive these services—that is, via spoken communication—and if that means is not available, for whatever reason, then

493 (Can.), the most recent SCC decision on Section 15, the Court dealt with the failure to include sexual preference as a ground for protection from discrimination under Alberta’s Individual Rights Protection Act, R.S.A. 1980, c. I-2 (Can.). The case arose when the lead plaintiff was dismissed from a Christian college for being a practicing homosexual. The court unanimously decided that the provincial legislation violated Section 15 of the Charter, but the court was careful to state that:

It is also unnecessary to consider whether a government could properly be subjected to a challenge under section 15 of the *Charter* for failing to act *at all*, in contrast to a case such as this where it acted in an underinclusive manner. . . . It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. . . . [I]t is neither necessary nor appropriate to consider that broad issue in this case.

Vriend, [1998] 1 S.C.R. at ¶¶ 63–64.

Even though the court refused to decide whether Section 15 could require the government to take positive actions, the decision at least clearly indicated that government actions had to take account of existing social realities. Lesbians and gay men faced social discrimination where heterosexual persons did not, and “[i]t is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it creates a potentially discriminatory distinction.” *Id.* at ¶ 84. The Ontario Court of Appeals in *Ferrell v. Ontario (Attorney General)*, [1998] 168 D.L.R. (4th) 1 (Can.), reviewed much of the SCC’s pronouncements on this point and expanded in some length on its own *dicta* opinion that Section 15(1) did *not* impose a duty of positive action on the government. The appellants in *Ferrell* filed a further leave to appeal to the SCC, which was denied on Dec. 6, 1999, 179 D.L.R. (4th) vii (Can.).

⁶⁷ R.S.C. 1998, c. H-6 (Can.).

⁶⁸ Bruce Porter, *Beyond Andrews: Substantive Equality and Positive Obligations After Eldridge and Vriend*, 9 CONST. F. 71, 78 (1998).

rectification of the situation is merely "ancillary" to basic health care. In Pothier's words:

All patients require communication with their health care providers; hearing patients can do so directly, without charge, whereas deaf patients, assuming the health care provider does not know sign language, require an intermediary. . . . The Supreme Court of Canada's rejection of the characterization of sign language as an ancillary service is thus a rejection of an analysis that privileges able-bodied methods.⁶⁹

The Canadian Supreme Court has explicitly rejected the United States Supreme Court's adherence to formal equality and embraced a substantive model of equality in which the adverse effects of discrimination will be regarded as potentially violative of Section 15, even without any evidence of invidious motivation or malicious intent. With *Eldridge*, the court has acknowledged that true equality may require the government to take special measures to ensure that disadvantaged groups can fully enjoy and participate in the benefits afforded by law.⁷⁰

⁶⁹ Dianne Pothier, *Eldridge v. British Columbia (Attorney General): How the Deaf Were Heard in the Supreme Court of Canada*, 9 NAT'L J. OF CONST. L. 263, 269-68 (1998). Both Pothier and other authors remain wary of just how far *Eldridge* may be taken as a rejection of able-bodied norms in the face of severe disabilities given the SCC's slightly earlier decision in *Eaton v. Brant (County) Board of Education*, [1997] 142 D.L.R. (4th) 385, in which the court upheld a school board's decision to place a child with cerebral palsy in a special placement class over the parents' objections. See also generally Isabel Grant and Judith Mosoff, *Hearing Claims of Inequality: Eldridge v. British Columbia (Attorney General)*, 10 CANADIAN J. OF WOMEN AND THE L. 229 (1998); Margot Young, *Sameness/Difference: A Tale of Two Girls*, 4 REV. OF CONST. STUDIES 150 (1997).

⁷⁰ Nonetheless, the Canadian picture is not entirely rosy. While *Eldridge* and *Vriend* are encouraging, commentators have pointed out that they were both "easy" cases to decide factually and politically. See generally Margot Young, *Change at the Margins: Eldridge v. British Columbia (A.G.) and Vriend v. Alberta*, 10 CANADIAN J. OF WOMEN AND THE L. 244 (1998). Also, the "functional values" test, if applied as a threshold requirement of Section 15, has the potential to weaken or even negate the most liberating aspects of recognizing adverse discrimination. Through the back door, judicial focus would switch to legislative intentions and the objective relevance of disability for government actions and away from the real effects of inequality experienced by persons with disabilities. Furthermore, neither decision went so far as to actually endorse the idea that Section 15 could be used to *require* governments to enact social change by taking positive actions in an area where none had been taken in the past.

V. CONCLUSION

If the facts of *Eldridge* had been brought before the United States Supreme Court on Fourteenth Amendment constitutional grounds, as opposed to the ADA,⁷¹ it is questionable whether the plaintiffs would have prevailed. The health care legislation was facially neutral, and clearly enacted for a substantive general purpose, not "because of" its discriminatory effect upon persons with a disability. The most narrow application of formal equality perpetuates the exclusion of persons with disability by refusing to recognize that the "same" treatment can itself be discriminatory. In contrast, a material equality approach deals with the real-life consequences of "neutral" actions and requires accommodation when necessary to achieve equality.

Equal protection is violated because a person with a disability does not have equal access to the service that the government provides. The cases currently pending in the United States Supreme Court will determine whether the Fourteenth Amendment is a vehicle for achieving equality or just one more barrier in the road to equal citizenship for people with disabilities.

⁷¹ We note that it is questionable whether the Canadian federal government has the jurisdiction to enact legislation as sweeping in its application to private business as the ADA, given the Canadian Constitution's division of subjects between federal and provincial legislative spheres, and the long judicial history of constitutional interpretation. For example, the Employment Equity Act, R.S.C. 1985, c. 44 (Can.), holds both the federal government and federally registered businesses to a standard of reasonable accommodation in the employment of persons with disabilities and extends that requirement to provincial businesses that seek federal contracts, but does not directly apply to all private Canadian businesses. This is where issues concerning the ambit of the Charter's direct reach become critical. Similarly, it is arguable whether the SCC would find it unconstitutional if one province were to enact ADA-like legislation, while another Canadian province failed to do so.